Jan. 9. 1873

Field

Revised Miller

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~542.~~ 95

BENAJAH W. HIATT AND MARTHA ANN HIATT, APPELLANTS,

vs.

EDWARD S. BROWN.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MAY 24, 1871.

Dec. 2, 1873

SUPREME COURT OF THE UNITED STATES.

No. 542.

BENAJAH W. HIATT AND MARTHA ANN HIATT, APPELLANTS,

vs.

EDWARD S. BROWN.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Petition	1	1
Præcipe	5	2
Stipulation for cost	7	3
Summons	8	3
Continuance	10	4
Agreement extending time for answer	11	4
Agreement as to filing answer and reply	12	5
Agreement as to filing answer and reply	12	5
Answer of defendants	13	5
Continuance	25	9
Order transfering case to chancery docket and granting leave to file amended bill and answer, and case continued	26	9
Amended bill	27	9
Answer	59	20
Reply	74	25
Deposition of E. S. Brown	76	25
R. Crozier	107	35
Defendant's motion to strike amended pleadings from files	114	37
Affidavit	115	38
Motion to strike pleadings from files overruled	117	38
Depositions of Hiatt and wife for defendants	118	39
Continuance	132	43
Stipulation to open depositions	133	44
Deposition of A. M. Sawyer for defendants	134	44
Copy of answer of B. W. Hiatt in confiscation suit	141	46
Abstract from decree, (confiscation case)	148	48
Abstract and copies, (confiscation case)	150	49

	Original.	Print.
Agreed statement as to Cockerill's claim	160	52
Copy of Kenyon's mortgage and assignment to Brown	164	53
Copy of judgment against Perkins and assignment to Brown	168	54
Deposition of H. T. Green	172	56
Second deposition of E. S. Brown	178	58
Callahan's deposition	183	59
Agreement dispensing with copies of papers and allowing original	185	60
Order of sale to the marshal in Kenyon case	187	60
Order confirming sale in district court in Kenyon case	200	65
Agreed statement as to decree	202	66
Continuance	206	67
Decree	207	67
Appeal	211	68
Appeal bond	212	69
Certificate	215	69
Citation and service	216	70

1 Pleas before the Honorable John F. Dillon and Hon. Mark W. Delahay, judges of the circuit court of the United States in and for the district of Kansas, in chancery sitting, at a term of said court begun and held at Topeka, in said district, on Monday, the 28th day of November, A. D. 1870.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT. } No. 107.

Be it remembered that, on the 27th day of February, 1867, the complainant herein, by his solicitor H. T. Green, filed in the clerk's office of the circuit court of the United States in and for the district of Kansas, his petition and precipe, which said petition and precipe is in the words and figures fallowing, to wit:

Petition.

UNITED STATES OF AMARICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN, PLAINTIFF,
vs.
2 BENAJAH W. HIATT & MARTHA ANNE HIATT, his wife, defendants.

The said Edward S. Brown, who is a citizen of the State of Virginia, and a resident of the county of Cumberland, in said State, plaintiff, complains of the said Benajah W. Hiatt and Martha Ann Hiatt, defendants, residents and citizens of the State of Kansas, for that, heretofore, to wit, on the 29th day of May, A. D. 1860, the said defendants, Benajah W. Hiatt and Martha Ann Hiatt, did make and execute their certain joint and several bond or writing obligatory of that date, and then and there deliver the same to the said plaintiff, and thereby bound themselves, jointly and severally, to pay the said plaintiff the sum of twenty-four hunderd (2,400) dollars, twelve months after the date thereof, with interest from maturity at the rate of twenty per cent. per annum, a copy of which said bond is hereunto attached and herewith filed, marked (A,) and made a part hereof. And the said plaintiff further saith that the said defendants, Benajah W. Hiatt and Martha
3 Ann Hiatt, to secure the payment of said sum of money, together with interest as in said bond specified, did, on the same day of the date thereof, duly execute and deliver to the plaintiff their certain deed in writing, and thereby convey to the said plaintiff, Edward S. Brown, the following tract of land lying and being in the county ot Leavenworth, and State of Kansas, and containing three hundred & twenty (320) acres, to wit, the east half of section twenty-two, (22,) in township nine, (9,) of range twenty, (20,) to have and to hold the said tract or parcel of land, to him, the said Edward S. Brown, his heirs and assigns forever; and which said deed had a condition thereunder written, by which it was provided that if the said bond should be paid off and discharged when it should become due, then the said deed should be null and void; but otherwise it should remain in full force and virtue. And the said plaintiff further saith that said deed was, on said day and year aforesaid at

2½ o'clock of said day, left with the register of deeds of said county of Leavenworth for record and duly recorded.

And the said plaintiff further avers and says that the said bond was not paid off nor discharged when the same became due as pro-
4 vided in the condition of the said deed, nor have the said defendants, Benajah W. Hiatt & Martha Ann Hiatt, nor either of them, paid the same, or any part thereof, to the said plaintiff; and the plaintiff avers that there is now due him from the said defendants and on said bond and mortgage the said sum of twenty-four hundred dollars, with interest *with interest* as therein specified at the rate of twenty per cent. per annum from the maturity thereof.

Therefore plaintiff prays judgment against the said defendants for the said sum of twenty-four hundred dollars and interest on the same from the 29th day of May, A. D. 1861, at the rate of twenty per cent. per annum less the time during which intercourse, trade, and commerce was by act of Congress and proclamation of the President of the United States forbidden and interdicted between the citizens of this section of the Union & State of Virginia, the domicil of pl'ff, and the State of Kansas, the domicil of defendant', and that the said land of the said defendants be ordered to be sold, according to law, to satisfy said sum and costs, and for such general relief as to court shall seem meet.

H. T. GREEN,
Att'y for Pl'ff.

5 (A.)

$2,400.]

Twelve months after date, with interest from maturity, at twenty per cent. per annum, we, Benajah W. Hiatt and Martha Ann Hiatt, his wife, do hereby bind ourselves, jointly and severally, to pay Edward S. Brown twenty-four hundred dollars.

Given under our hands and seals in the county of Leavenworth, Territory of Kansas, the 29th day of May, 1860.

BENAJAH W. HIATT. [SEAL.]
MARTHA ANN HIATT. [SEAL.]

The clerk of the circuit court of the United States for the district of Kansas will issue summons in the above cause to the U. S. marshal for the district of Kansas. Pl'ff, Edward S. Brown, demands judgment for $2,400, with interest at the rate of 20 per cent. p'r 29th day , 1861, to date, less the period of the civil war in the United States, again Benajah W. Hiatt & Martha Ann Hiatt, & f'r cost.

H. T. GREEN,
Att'y for Pl'ff.

6 (Endorsed:) A. S. C. C. District of Kansas. No. 107. Edward S. Brown, pl'ff, vs. Benajah W. Hiatt & Martha Ann Hiatt, deff'ts. Petition. Filed February 27th, 1867. A. S. Thomas, clerk. H. T. Green.

7 And on this day, to wit, the 27th day of February, A. D. 1867, the complainant in this cause filed in the clerk's office of said court his stipulation for cost, which is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

I enter myself security for cost in said case and promise to pay all costs which may accrue to the opposite party in this action, *to* or to any of the officers of the court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 27th day of February, A. D. 1867.

H. T. GREEN.

(Endorsed:) U. S. C. C., dist. of Kansas. No. 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Stipulation for costs. Filed Feb. 27, 1867. A. S. Thomas, clerk.

And on this day, to wit, the 27th day of February, A. D. 1867, a summons issued out of the clerk's office of said court, which said summons is in the words and figures following, to wit:

8 Circuit court of the United States of America, district of Kansas, ss:

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify Benajah W. Hiatt and Martha Ann Hiatt, his wife, that they have been sued by Edward S. Brown, in the circuit court of the United States for the district of Kansas, and that unless they answer by the 9th day of April, 1867, the petition of the said Edward S. Brown against them, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this writ on the 20th day of March, A. D. 1867.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district this 27th day of February, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the 91st year.

A. S. THOMAS, *Clerk.*

[Revenue stamp & seal.]

9 (Endorsed:) Action brought for the recovery of money. The plaintiff demand' judgment for the sum of $2,400, with interest from the 29th day of May, A. D. 1861, at the rate of 20 p'r cent. per annum to date, less the period of the civil war in the United States.

H. T. GREEN, *Att'y for Pl'ff.*

(Endorsed farther:) No. 107. Circuit court of the United States, district of Kansas. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Summons issued Feb. 27th, 1867; returnable March 20th, 1867. H. T. Green, att'y for pl'ff.

Marshal's return.

U. S. OF AMERICA, *District of Kansas, ss:*

By virtue hereof I this day served the within summons upon the within-named Benajah W. Hiatt, and Martha Ann Hiatt, by reading the within summons to them, and by leaving with each of them in hand a true and attested copy thereof. This the 19th of March, A. D. 1867.

THO'S A. OSBORN,
U. S. Marshal for Dist. of Kan.,
By W'M ROBERTS,
Dep't. U. S. Marshal.

Fees: serving summons, $4 00; mil'age, (80 miles,) $4 80 = $8 80.

10 *Filing.*

Filed March 20th, A. D. 1867.

S. A. THOMAS, *Clerk.*

At a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, May 27th, A. D. 1867, there was present Hon. Mark W. Delahay, judge of said court.

At which term of said court, on the 28th day of May, A. D. 1867, among other proceedings the following were had, and appear of record in words and figures following, to wit:

TUESDAY, *May 28th*, 1867.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

By agreement it is now by the court here ordered that this cause be, and the same is now, continued to the next term hereof.

11 And afterwards, on the 27th day of June, A. D. 1867, an agreement for extension of time was filed, which is in the words and figures following, to wit:

In the circuit court U. S.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT ET AL.

The rule for answer is extended in this case 15 days from April 9th, inst. Copy to be furnished by def'ts' att'y to pl'ff's att'y.

Pl'ff has until 1st day of term to reply. April 3d, 1867.

H. GRISWOLD, *Att'y for Def'ts.*
H. T. GREEN, *Att'y for Pl'ff.*

(Endorsed:) No. 107. Brown vs. Hiatt. Filed June 27th, 1867. A. S. Thomas, clerk.

And on said 27th day of June, A. D. 1867, an agreement to answer and reply was also filed, which is in the words and figures following, to wit:

12 *In the circuit court of the U. S. in & for the dist. of Kan.*

EDWARD S. BROWN
vs.
BENAJAH W. HIATT ET AL.

By agreement of parties the answer and reply in this case may be filed any time on or before the first day of next term of said court, but the case to stand for trial as if filed within the rule.

April 23d, 1867.

H. GRISWOLD, *Att'y for Def'ts.*
H. T. GREEN, *Att'y for Pl'ff.*

(Endorsed:) No. 107. Brown vs. Hiatt. Filed June 27th, 1867. A. S. Thomas, clerk.

And farther, on said 27th day of June, A. D. 1867, an agreement for further extension of time for filing answer was agreed to, which is in the words and figures following, to wit:

In the circuit court of the U. S. in & for the dist. of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT ET AL.

13 It is agreed the time for filing answer in this case is still further extended, and may be filed at any time within three days after notice to the defendants' counsel by plaintiff's counsel to file the same.

May 24th, 1867.

H. T. GREEN, *Att'y for Pl'ff.*
H. GRISWOLD, *Att'y for Def'ts.*

(Endorsed:) No. 107. Brown vs. Hiatt. Filed June 27th, 1867. A. S. Thomas, clerk.

And on this day, to wit, the 27th day of June, A. D. 1867, the said defendants, by their attorney, filed in the said clerk's office their answer in the said entitled cause, which answer is in the words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the district court of the United States within and for the district of Kansas.

EDWARD S. BROWN, PLAINTIFF,
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT, def'ts.

14 1. And now come the defendants, Benajah W. Hiatt & Martha Ann Hiatt, and, for answer to the plaintiff's petition filed in this

case, say that, though true it is they executed and delivered to the plaintiff the bond or writing obligatory and the mortgage in said petition described, yet they say that at the time when said bond & mortgage were executed and delivered to the plaintiff, this defendant, Benajah W., owned and held a promissory note against one George W. Purkins for the sum of four hundred and seventy-five dollars, dated February 23rd, 1857, payable on demand, with interest until paid at the rate of twenty-five per cent. per annum, which said note was secured by a mortgage, also executed by said Purkins to this defendant, Benajah W., dated April 9th, 1858, and duly recorded in the office of register of deeds of Leavenworth County, in the State of Kansas, upon lot number twenty, (20,) in block number fifteen, (15,) in the city of Leavenworth, in said Leavworth County, which said lot was ample security for the payment of the principal and interest of said note, and on which note & mort-
15 gage a suit was then pending in the district court in & for said Leavenworth County against said Purkins, brought by this defendant, Benajah W., for the foreclosure of said mortgage; and also, at the same time, said Benajah W. owned & held a certain other note against one John H. Kenyon, given by him to this defendant, Benajah W., for eight hundred dollars, dated December 11th, 1858, and payable December 25th, 1860, with interest, which was secured by mortgage, executed by said Kenyon to this defendant, Benajah W., on the south-east quarter of section number 30, in township number 9, of range number 21, in said Leavenworth County, and duly recorded in the office of the register of deeds of said county, which said land was ample security for the payment of said note.

And these defendants further allege that it was then, to wit, at the time the said bond and mortgage in the petition mentioned was executed and delivered, agreed between these defendants and the plaintiff that this defendant, Benajah W., should assign said Kenyon note and
16 mortgage to the plaintiff, and that said suit then pending in said district court should be prosecuted to final judgment, a decree obtained ordering the sale of the lot described in said Purkins mortgage, and that a sale of said lot should be had under said decree, at which sale this plaintiff should become the purchaser thereof, and that when such sale should be confirmed by said court, and the said Kenyon note & mortgage assigned as aforesaid, the said lot so to be purchased, & said Kenyon note and mortgage should be taken, considered, and treated as a full payment and satisfaction of said bond and mortgage in the petition in this case described, and that the plaintiff should and would thereupon surrender said bond and mortgage to these defendants, and release said mortgage of record; and the defendants allege that thereupon, in pursuance of said agreement, the defendant Benajah W. did at that time assign, transfer, and deliver to the plaintiff said
17 Kenyon note and mortgage; that the plaintiff received and kept the same under and in pursuance of said agreement, and as a part of said transaction; that the said suit then pending in said district court of Leavenworth County was prosecuted to final judgment; the said lot ordered to be sold to pay the amount due on said note, to which the mortgage described in the proceedings in that case was collateral; that, under said judgment the said lot was sold at public aution by A. F. Callahan, a master commissioner, and that at such sale the plaintiff became the purchaser thereof; that such sale was confirmed by said court on or about the day of May, 1861, and a deed for said lot was thereupon executed by said master commissioner to the plaintiff, and has been duly recorded in the office of the register of deeds of said

county, and said purchase having been made under the agreement aforesaid, the plaintiff has never paid the said Benajah W. the purchase-money for said lot, nor any part thereof.

And these defendants aver that the said bond & mortgage in
18 the petition described have, in the manner and by the means aforesaid, been fully paid and discharged, and that they are wholly released, and discharged all liabilities thereon.

2. And for a further answer to said petition, and as a second ground of defense, the defendants say that, though true it is that they executed the bond or writing obligatory in said petition described, and that they did also execute the mortgage in said petition described to secure the payment thereof, yet they say that, at the time said bond and mortgage were executed and delivered to the plaintiff, this defendent, Benajah W. Hiatt, held and owned a promissory note against one George W. Purkins for the sum of four hundred and seventy-five dollars, dated February 23d, 1857, payable on demand, with interest until paid, at the rate of twenty-five per cent. per annum, which note was secured by a mortgage, also executed by said Purkins to this defendant, Benajah W., dated April 9th, 1858, and duly recorded in the office of the register of deeds of Leavenworth County, in the State of Kansas,
19 upon lot number twenty, (20,) in block number fifteen, (15,) in the city Leavenworth, in said Leavenworth County, which said lot was ample security for the payment of the principal and interest of said note, and on which note and mortgage a suit was then pending in the district court in and for said Leavenworth County against said Purkins, brought by this defendant, Benajah W., for the foreclosure of said mortgage. And also, at the same time, said Benajah W. owned and held a certain other note against one John H. Kenyon, given by him to this defendant, Benajah W., for eight hundred dollars, dated December 11th, 1858, and payable December 25th, 1860, with interest, which was secured by mortgage executed by said Kenyon to this defendant, Benajah W., on the southeast quarter of section number 30, in township number 9, of range number 21, in said Leavenworth County, and duly recorded in the office of the register of deeds of said county, which said land was ample security for the payment of said note.

And these defendants further allege that it was then, to wit,
20 at the time the said bond and mortgage in the petition described were executed and delivered, agreed between these defendants and the plaintiff that this defendant, Benajah W., should assign said Kenyon note and mortgage to said Brown, and that said suit then pending in said district court should be prosecuted to final judgment, a decree obtained ordering the sale of said lot described in said Purkins mortgage, and that a sale of said lot should be had under said decree, at which sale this plaintiff should become the purchaser thereof; and that when said sale should be confirmed by said court, and the Kenyon note and mortgage assigned as aforesaid, the said lot so to be purchased, and said Kenyon note and mortgage should be taken, considered, and treated as a full payment and satisfaction of said bond and mortgage in the petition in this case mentioned and described, and that the plaintiff should and would thereupon surrender said bond and mortgage to these defendants, and release said mortgage of record.

And the defendants allege that, thereupon, in pursuance of
21 said agreement, this defendant, Benajah W., did, at that time, assign, transfer, and deliver to the plaintiff the said Kenyon note and mortgage; that the said suit then pending in said district

court of Leavenworth County was prosecuted to final judgment; the said lot ordered to be sold to pay the amount due on said note to which the mortgage described in the proceedings in that case was collateral; that, under said judgment, the said lot was sold at public auction by A. F. Callahan, a master commissioner, and that, at such sale, the plaintiff became the purchaser thereof; that such sale was confirmed by said court, on or about the day of May, 1861, and a deed for said lot was thereupon executed by said master commissioner to the plaintiff, and has been duly recorded in the office of the register of deeds of said county, and said purchase having been made under the agreement aforesaid, the plaintiff has never paid the said Benajah W. the purchase-money for said lot, or any part thereof. And the defendants further allege that, in the year 1863, a certain suit or pro-
22 ceeding was pending in the United States district court in and for the district of Kansas, in which the plaintiff and these defendants and others were defendants, which was commenced and prosecuted by the United States for the purpose, among other things, of confiscating the said pretended debt from these defendants to the plaintiff, for the reason that the plaintiff had acted as an officer of the army of the rebels in arms against the Government of the United States, and otherwise participated in the late rebellion against the Government of the United States, in which suit or proceeding these defendants, having filed their answer alledging that in the manner herein alleged the said note or bond and mortgage had been paid and satisfied; and thereupon said suit or proceeding as to them was dismissed. And in the same proceeding the said Kenyon note and mortgage, and said lot in Leavenworth was, by the judgment of said court, as the property of the plaintiff, confiscated to the Government of the United States.

3. And, for a further answer to said petition, and as a third ground of defense, the defendants say that, though true it is they did
23 execute the bond or writing obligatory, and the mortgage in the plaintiff's petition described, yet they say that the only consideration for the said bond and mortgage was the sum of two thousand dollars borrowed by them of the plaintiff on the day of the date thereof, and that, on or about June 1st, 1860, this defendant, Benajah W., assigned and delivered to the plaintiff a certain debt he then had and owned against one John H. Kenyon, on which there was then due the sum of nine hundred and fifty-five dollars; and also, a certain debt he then had and owned against one George W. Purkins, on which there was then due the sum of one thousand and fifty-five dollars, both of which debts were secured by mortgages on real estate, and which the plaintiff received on account of, and to apply on, the indebtedness of the defendants to the plaintiff in the petition described; and the defendants say that the plaintiff has never returned such assignments, nor either of them to this defendant, Benajah W., but that he still holds the same, nor has he ever retransferred said debts, or either of
24 them, or any part their'of to this defendant, Benajah W. And the defendants further say that if the plaintiff has not collected said debts it has been because of his own neglect; and they further say, if said debts are not collected, the collection thereof is now barred by the statute of limitations of the State of Kansas, in which State said Kenyon and said Purkins then resided, and that said debts have thus become valueless by the laches of the plaintiff.

4. And for a further answer to said petition, and as a fourth ground of defense, these defendants say the plaintiff cannot and should not have or maintain this action against them, because they say that said

action was not commenced against them within three years after the alleged cause of action in the petition stated accrued.

ROBT CROZIER,
Att'y for Def'ts.

(Endorsed:) No. 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Answer. Filed June 27th, 1867. A. S. Thomas, clerk.

25 At a term of the circuit court of the United States of America, in and for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, November 25th, A. D. 1867, there was present Hon. Mark W. Delahay judge of said court. At which term of said court, on the 25th day of November, A. D. 1867, among other proceedings, the following were had and appear of record in words and figures following, to wit:

MONDAY, *Nov. 25th*, 1867.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

By agreement of parties, ordered that this cause be continued to next term.

At a term of the circuit court of the United States of America in and for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, May 25th, A. D. 1868, there were present Hon. Samuel F. Miller and Hon. Mark W. Delahay judges of said
26 court.

At which term of said court, on Thursday, May 27th, 1868, among other proceedings, the following were had, and appear of record in words and figures following, to wit:

WEDNESDAY, *May 27th*, 1868.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

On motion of the plaintiff, by his counsel, H. T. Green, it is ordered by the court that this case be transfer'ed to the chancery docket, and the plaintiff has leave to file an amended bill; which is done, and the defendants have leave to file answer to the same; and, by agreement of counsel, this cause continued to next term.

27 And on this day, to wit, the 1st day of April, A. D. 1869, came the said complainant, by his solicitor, and filed in the said clerk's office his amended bill, with endorsments thereon, and which bill is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
District of Kansas:

To the judges of the circuit court of the United States for the district of Kansas:

Edward S. Brown, of the city of Lynchburg, and State of Virginia, and

a citizen of the State of Virginia, brings this, his amended bill, against Benajah W. Hiatt, of the county of Leavenworth, and State of Kansas, and a citizen of the State of Kansas, and Martha Ann Hiatt, of the county of Leavenworth, and State of Kansas, and a citizen of the State of Kansas.

And thereupon your orator, the said Edward S. Brown, complains and says that said Benajah W. Hiatt and said Martha Ann Hiatt, his wife, heretofore, to wit, on the 29th May, 1860, in the then Territory, now State, of Kansas, signed and sealed their certain bond of that
28 date and delivered it to your orator by which they bound themselves, twelve months after date, with interest from maturity at twenty per cent. per annum, jointly and severally, to pay to your orator twenty-four hundred dollars. Said bond, marked "A," is herewith filed and hereto attached as a part of this bill. And your orator further says that, on the said 29th day of May, 1860, said Benajah W. Hiatt and the said Martha Ann Hiatt, his wife, in the county of Leavenworth, then Territory, now State, of Kansas, made and executed their certain mortgage deed of conveyance, of that date, and then and there delivered the same to your orator for the purpose of securing the payment of said bond to your orator, and therein specified and conveyed to your orator the following described tract of land, situate, lying, and being in the county of Leavenworth, and State of Kansas, namely, the east half of section twenty-two, (22,) in township nine, (9,) range twenty, (20,) containing 320 acres, to have and to hold the said tract or parcel of land to your orator and his heirs forever; which deed was sub-
29 ject to a certain condition, thereunder written, whereby it was and is provided that if the said bond should be paid off and discharged when it should become due and payable, then that said mortgage-deed should become and be null and void.

And your orator further says that, afterwards, to wit, on the said 29th day of May, 1860, said Benajah W. Hiatt and Martha Ann Hiatt, in the county of Leavenworth, in the then Territory, now State, of Kansas, before one John P. Slough, who was then and there a notary public in and for said county, in said Territory, duly acknowledged the execution of said deed; that the same was their own voluntary act and deed, and that the said Martha Ann Hiatt, wife of said Benajah W. Hiatt, being examined, prively and apart from he' husband, and having said conveyance fully explained to her, acknowledged that she had executed the same without compulsion or under influence of her husband, and that said instrument was her own voluntary act and deed; which acknowledgment was duly certified by said John P. Slough, notary public; which deed and certificate of acknowledgment were duly deposited and filed for record in the office
30 of the registry of deeds in and for said county of Leavenworth, and the then Territory, now State, of Kansas, and the same were, then and there, duly recorded in book L, page 476, which mortgage-deed is herewith filed, marked "B," as a part of this bill.

And your orator further says that, at the time of the execution of said bond and said mortgage, to secure the payment thereof, when the same should become due and payable, it was agreed between Benajah W. Hiatt and your orator, as additional security for the payment of said bond, that said Benajah W. Hiatt would assign to your orator two collaterals, one of them a note executed by John H. Kenyon to said Benajah W. Hiatt, for $800 00, payable the 25th Dec., 1860, at 6 per cent. interest from the 11th Dec., 1858, on which a credit of $75, as of the 7th Feb., 1860, had been previously endorsed, which note was secured

by a mortgage executed by said Kenyon; the other a judgment in favor of said Benajah W. Hiatt against Geo. W. Perkins for $763 with interest thereon at per c't per annum, from the day of and cost $13 82, which was said to be secured by a mortgage executed
31 by said Perkins; and, in pursuance of this agreement, on the 29th May, 1860, at the time of the execution of the bond for $2,400 and the mortgage to secure the payment thereof, Benajah W. Hiatt wrote his assignment to your orator, of said judgment, on the margin of the record where the same was entered, and his assignment of Kenyon's mortgage on the margin of the record where said mortgage was entered, as collateral security for the payment of said bond of $2,400, and Benajah W. Hiatt then delivered to your orator Kenyon's note for $800 as aforesaid, and the original mortgage-deed from said Kenyon, to secure the payment of said note.

And your orator further says that it was then agreed, between your orator and said Benajah W. Hiatt, that, as your orator would in a few days thereafter return to his home, in Virginia, that said Benajah W. Hiatt would attend, as far as necessary, to said collaterals, so that when said bond for $2,400 should become due, if not otherwise paid, resort might be had to those collaterals for that purpose.

And you orator farther says that, in a few days after the said 29th of May, 1860, he did return to his home in Virginia and carried with
32 him said note of John H. Kenyon for $800, and the mortgage given by said Kenyon to secure the payment of the same; that, in September, 1865, he returned to Kansas and brought back said note and mortgage, and placed the same, together with said bond for $2,400, and other papers in the hands of his counsel, H. T. Green. Kenyon's said mortgage deed is herewith filed, marked "C," but said Kenyon's note for $800, your orator is informed, has been mislaid or lost; when found, it, or a copy thereof, shall be filed with the papers in this suit. If not found, affidavits of the loss thereof shall be filed. Said Kenyon's mortgage refers to another note of $400 falling due at an earlier date, but your orator never saw the note for $400 and never had anything to do with it. Your orator was informed by said Hiatt that said note for $400 had been previously paid. Your orator has not seen Benajah W. Hiatt since the 29th May, 1860. A few letters passed between your orator and Benajah W. Hiatt in regard to recording a deed which was necessary to secure some defect in the title of said Benajah W. Hiatt and Martha Ann Hiatt to the lands they had mortgaged and in regard to said collaterals.

33 Your orator received a letter from Benajah W. Hiatt, dated the 11th April, 1861, saying he had the mortgage*d* closed in Leavenworth on the Perkins house and lot, and bought it in, and asked how shall that be arranged; he also inquired about arranging the Kenyon mortgage, and then he speaks of having a good prospect of paying off the mortgage on his land when it becomes due; that he should probably work on a contract in Pennsylvania, and the proceeds he intended to pay on the mortgage. This letter, marked "D," is herewith filed.

On the 15th April, 1861, your orator, before he had received said Hiatt's letter of the 11th of April, 1861, wrote to said Hiatt inquiring about the judgment against G. W. Perkins, and said: "If the sale of the property is confirmed and it be bought in, the deed of conveyance, if it can be so arranged, had better show on its face our understanding that this is collateral security, together with the mortgage which you and Mrs. Hiatt gave on the land of yourself and Mrs. Hiatt to me, which is to be released when the bond and interest is paid." That letter was duly mailed

to said Benajah W. Hiatt. The first draft of that letter has been
34 preserved among your orator's papers and is now herewith filed, marked "E." The letter sent was copied from the paper marked "E," now filed, and corresponds with it, except the erasures.

Afterwards, your orator received a letter from Benajah W. Hiatt, dated 4th May, 1861, acknowledged the receipt by him of your orator's said letter of the 15th of April, 1861, in which he said the sale of the Perkins property was not confirmed yet; that he had not as yet been able to pay the costs of sale; that John H. Kenyon was ready to renew his mortgage and note for 20 per cent., which, he, said Hiatt, wanted done as it would save him paying 10 per cent. out of his own pocket; that his note had been due ever since Christmas and only drawing 10 per cent., while he, said Hiatt, was paying your orator 20 per cent. This letter is herewith filed, marked "F." To that letter your orator replied the 29th May, 1861. He proposed a paper to be signed by John H. Kenyon, which was designed to bind him to pay to Benajah W. Hiatt said additional interest on his note of $800 as would be equal to 20 per cent. corresponding with the interest said Hiatt was paying your ora-
35 tor. This paper, together with your orator's reply, were duly mailed to Benajah W. Hiatt. A true copy of your orator's said letter of the 29th May, 1861, is herewith filed, marked "G."

The 1st draft of the paper for Kenyon to sign, enclosed with the reply written the 29th May, 1861, is herewith filed, marked "H." Your orator knows that the paper enclosed with his said letter of the 29th May, 1861, corresponds substantially with that filed, and he believes it corresponds literally, except the erasures. This closed the correspondence of your orator with said Benajah W. Hiatt. He never had any communication with him or with Martha Ann Hiatt, of any kind, after that time.

And your orator further says that said judgment against said Geo. W. Perkins was at the time of said assignment, and has ever since continued to be wholly unavailing and worthless; that said Perkins was then, and has ever since been, insolvent; that the mortgage intended to secure the payment of the note on which said judgment was awarded and a decree of foreclosure rendered, proved to be of no value; that a certain Clinton Cockrill claimed a prior mortgage on the same
36 property; that said Cockrill instituted suit on the 28th November, 1862, in the district court of the 1st judicial district for the State of Kansas, against said Perkins, said Benajah W. Hiatt, and your orator, in which suit on the 22nd May, 1863, it was adjudged that the mortgage under which said Cockrill claimed was entitled to priority over the mortgage under which said Hiatt claimed.

And your orator further says that the property in said mortgage mentioned, was not sufficient to satisfy said prior mortgage in favor of said Cockrill.

And your orator further says that, in March, 1863, two suits numbered 140 & 141, were instituted against your orator and divers citizens of the State of Kansas, (among them the said Benajah W. Hiatt & Martha Ann Hiatt,) in the district court of the United States for the district of Kansas, under the act of Congress of the 17th July, 1862, to confiscate to the Government of the United States divers debts due to your orator from said citizens, among them, the debt due from said Benajah W. Hiatt and Martha Ann Hiatt on said bond for $2,400. In said suit
37 an answer was filed in the name of Benajah W. Hiatt and Martha Ann Hiatt, sworn to by said Benajah W. Hiatt on the 26th June, 1863, in which the said Benajah W. Hiatt pretended that, at the time the said mortgage to secure the payment of the bond for $2,400 was exe-

cuted, it was agreed by your orator and said Benajah W. Hiatt, that said Kenyon's note should be assigned to your orator, and that your orator would become the purchaser of the house and lot mentioned in Perkins' mortgage, and that the same should be treated as full payment and satisfaction of said bond for $2,400; and he further pretended that those things had been done; and thereupon it was ordered that said confiscation proceedings should be dismissed as to said Benajah W. Hiatt and Martha Ann Hiatt, without prejudice.

And your orator further says that, after the filing of said answer a suit was instituted in the district court of the United States for the district of Kansas, under the style of The United States vs. A Note for $800, payable to B. W. Hiatt, made by John H. Kenyon, No. 152, to confiscate said note to the United States, and the same was declared to be forfeited to the United States.

38 And your orator further says that it is not true, as said Benajah W. Hiatt pretends, that your orator agreed to take said Kenyon's note and said Perkins' house and lot in payment and satisfaction of said bond for $2,400; the truth is, that said Kenyon's note and said judgment were only held as collateral to the mortgage executed by Benajah W. Hiatt and Martha Ann Hiatt to secure the payment of the bond for $2,400 when the same should become due, and there never was any understanding or agreement between your orator and said Hiatt different from or contrary to that now here stated by your orator.

And your orator further says that Benajah W. Hiatt pretends that your orator became the purchaser of the house and lot purporting to have been conveyed in the mortgage from said Perkins to said Hiatt; but the truth is, that said Hiatt, without authority from your orator, at a pretended sale of said house and lot, bought in the same; but he did not then pretend that said house and lot after said pretended sale, was held other than collateral security, as the judgment had been held be-

39 fore; and your orator never understood the matter otherwise nor changed the agreement in regard thereto. Said Hiatt pretended that said sale was confirmed and a deed of conveyance of them executed and recorded; but the truth is, that the pretended confirmation was on the day of November, 1862, and the pretended execution and recording of the deed of conveyance was on the day of December, 1862, pending said Cockrill's suit against said Perkins, and said Hiatt, and your orator.

And it is further true, that your orator resided in that portion of the State of Virginia which, by act of Congress and the proclamation of the President of the United States in pursuance thereof, was declared to be in insurrection, and between those inhabitants and the citizens of the rest of the United States intercourse was prohibited; of said confirmation and said deed your orator had no knowledge until after the close of the war, and said Hiatt had no authority to act for your orator except so far as might be necessary to preserve those collaterals to secure

40 the payment of the bond for $2,400, if the said mortgage should prove inadequate for that purpose. Said Hiatt pretends that he is entitled to a credit on said bond for $2,400 by the amount at which it was pretended that he bought in said house and lot for your orator; but the truth is, your orator never received anything on account of said pretended sale, and said Hiatt never lost anything, but he, said Hiatt, and his attorneys, not employed by or authorized to act for your orator, conducted and managed this matter as to them seemed fit, and of said proceedings from May, 1861, until Sept., 1865, your orator has no knowledge.

And your orator further says that said Hiatt pretends that he should have credit on said bond for $2,400 by the amount of said Kenyon's note, because said note has been confiscated; the truth is, if it has been confiscated, it was confiscated by and through*t* the false and fraudulent representations of said Hiatt. If the claim be lost, it is not lost through any fault of your orator, but through the misconduct of said Hiatt
41 whose undertaking to your orator was to take care of this collateral. He pretends that your orator is guilty of laches in not enforcing the collection of this claim from said Kenyon; the truth is, that the indulgence given before the war commenced was with Hiatt's approval; when the war was over your orator, who had no knowledge of this matter during that interval, then learned that said Hiatt had procured the confiscation of this note. Your orator had no opportunity of taking care of this claim; said Hiatt, who had undertaken to take care of it, threw it away.

And your orator further says that said Benajah W. Hiatt and Martha Ann Hiatt pretend that your orator's suit was not commenced within three years from the time that the cause of action accrued, and is barred by the statute of limitations of the State of Kansas. Your orator says that, during his whole life, he has been a resident and citizen of the State of Virginia, and has ever resided in that portion of said State which, during the late war between the so-called Confederate States and the United States, was held by said Confederate States, and from whose inhabitants it claimed allegiance; that, under the act of Congress of the 13th July, 1861, and the proclamation of
42 the President of the United States in pursuance thereof, the inhabitants of that portion of Virginia, with those of other parts of the country, were declared to be in a state of insurrection against the United States, and all commercial intercourse between such inhabitants and the citizens of the rest of the United States was prohibited and held to be unlawful, so long as such hostility should continue; that this prohibition continued until the President of the United States issued his proclamation of the , 1865; that your orator had no letters of safe conduct, no license or permission to go inside or remain in the rest of the United States, nor to have any commercial or other intercourse with the citizens thereof; that he did not go, nor reside nor remain in the rest of the United States, nor have any commercial or other intercourse with the citizens thereof during said prohibition; but during the whole of said time he resided and remained in said portion of Virginia; that Benajah W. Hiatt and Martha Ann Hiatt, the defendants, were, during the whole of said space of time, citizens of the rest of the United States, and resided and re-
43 mained therein; that the time during which said prohibition existed, and during which said war existed, is, by operation of law, excluded from the computation in which the statute of limitations bars your orator's right of action; and, excluding said time, your orator's suit was instituted within three years from the time his right of action accrued, and is not barred by said statute of limitation.

In consideration whereof your orator prays that a proper writ of subpœna be issued in this suit to and against the aforesaid defendants, Benajah W. Hiatt and Martha Ann Hiatt, and that they and each of them be required, on oath, to make true and perfect answer to all and singular the statements and allegations herein contained: That Benajah W. Hiatt produce and file, as evidence in this suit, the letter written to him by your orator, dated the 15th April, 1861, and the letter written to him by your orator, dated the 29th May, 1861, and the paper therein

enclosed intended for John H. Kenyon to sign; and that the defendants, Benajah W. Hiatt and Martha Ann Hiatt, be, and each of
44 them be, by this honorable court adjudged and decreed to pay to your orator the said sum of $2,400 in said bond mentioned, with interest at the rate of 20 p'r cent. per annum after the maturity of said bond, and your orator's costs herein, in some short time to be fixed by your honors; and that if default be made in said payment, it be ordered, adjudged, and decreed that said 320 acres of land, being the east half of section 22, in township 9, range 20, in said mortgage deed from B. W. Hiatt and Martha Ann Hiatt conveyed, be sold, and that the marshal of the United States for the district of Kansas, proceed to sell the same, and that the proceeds of sale be applied in payment of said sum of money, interest, and costs, and that said Benajah W. Hiatt and Martha Ann Hiatt be, and each of them be, forever barred and foreclosed from all and any right and equity of redemption in and to said land; that a writ of assistance in favor of the purchaser at said sale; and that your orator may have such other and further relief in the premises as his case may require, and to your honors may seem meet to grant. And your orator will ever pray, &c.

EDWARD S. BROWN, *Pl'ff.*

H. T. GREEN,
Sol. & Coun. for Pl'ff.

45 The above-amended bill filed by consent.
Nov. 11th, 1868.

H. GRISWOLD,
Sol. & Coun. for Def't.

EXHIBIT "A."

$2,400.]

Twelve months after date, with interest from maturity at twenty per cent. per annum, we, Benajah W. Hiatt and Martha Ann Hiatt, his wife, do hereby bind ourselves, jointly and severally, to pay to Edward S. Brown twenty-four hundred dollars.

Given under our hands and seals, in the county of Leavenworth, Territory of Kansas, the 29th day of May, 1860.

BENAJAH W. HIATT. [SEAL.]
MARTHA ANN HIATT. [SEAL.]

EXHIBIT "B."

This deed, made the 29th day of May, 1860, between Benajah W. Hiatt and Martha Ann Hiatt, his wife, of the county of Leavenworth, Territory of Kansas, of the first part, and Edward S. Brown, of the county of Cumberland, State of Virginia, of the second part, witnesseth:

That, in consideration of twenty-four hundred dollars, to Bena-
46 jah W. Hiatt and Martha Ann Hiatt, his wife, in hand paid, the receipt of which is hereby acknowledged, they, Benajah W. Hiatt and Martha Ann Hiatt, his wife, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey to Edward S. Brown a tract or parcel of land lying in the county of Leavenworth, Territory of Kansas, containing three hundred and twenty acres, being by Government survey the east half of section twenty-two, (22,) in township nine, (9,) of range twenty, (20,) granted by letters-patent from the

United States to James S. Phelps, and by said Phelps conveyed to Martha Ann Hiatt, one of the parties of the first part, in this deed: To have and to hold the said tract or parcel of land to him the said Edward S. Brown, his heirs and assigns forever. And Benajah W. Hiatt and Martha Ann Hiatt, his wife, do hereby severally warrant to Edward S. Brown a clear right and title in and to said land, and they hereby severally covenant to execute to him, at any future time, such other and further assurances of title as may be right and proper,
47 and to defend the same to him, the said Edward S. Brown, against the claims of all persons whomsoever:

Upon condition that whereas Benajah W. Hiatt and Martha Ann Hiatt, his wife, have executed to Edward S. Brown their joint and several bond, for twenty-four hundred dollars, of the same date with this deed, payable twelve months after date, with interest from maturity at twenty per cent. per annum: Now, if the said bond shall be paid off and discharged when it shall become due, then this deed shall be null and void; but otherwise it shall remain in full force and virtue.

In testimony whereof we, Benajah W. Hiatt and Martha Ann Hiatt, his wife, do hereunto set our hands and affix our seals the day and year above written.

BENAJAH W. HIATT. [SEAL.]
MARTHA ANN HIATT. [SEAL.]

Witness: JOHN P. SLOUGH.

TERRITORY OF KANSAS,
County of Leavenworth, to wit:

I, John P. Slough, a notary public in the county of Leavenworth, Territory of Kansas, do hereby certify that Benajah W. Hiatt and Martha Ann Hiatt, his wife, who are personall' known to me
48 to be the identical persons whose names are affixed to the foregoing deed as grantors therein, personally appeared before me in the county and Territory aforesaid, and Benajah W. Hiatt acknowledged the instrument to be his own voluntary act and deed. And Martha Ann Hiatt, his wife, being examined apart from her husband, and, having this conveyance fully explained to her, acknowledged that she had executed the same without compulsion or undue influence of her husband, and that the instrument is her own voluntary act and deed.

Witness my hand and official seal this the 29th day of May, A. D. 1860.

JOHN P. SLOUGH,
Notary Public.

(Endorsed:) 42. B. W. Hiatt and Marth Ann Hiatt to Edward S. Brown. Mortgage.

TERRITORY OF KANSAS,
Leavenworth County:

This mortgage was filed for record May 29, A. D. 1860, at 2½ o'clock p. m., and recorded in book L of mortgages at page 476.

W. S. VAN DOREN,
Register of Deeds.

Fee 1 50, paid.

EXHIBIT "C."

Know all men by these presents that John H. Kenyon, of Leaven-

worth County, and Territory Kansas, for and in consideration of ten hundred and ninety-five dollars to him paid by Benajah W. Hiatt, of the same county and Territory, the receipt whereof is hereby acknowledged, doth hereby bargain, sell, and convey to the said Benajah W.
49 Hiatt, his heirs and assigns forever, the following described real estate, situated in Leavenworth County, Kansas Territory, to wit: The southeast quarter of section thirty, township nine, range twenty-one, of the Delaware trust land of Kansas Territory, containing one hundred and sixty acres; to have and to hold the same to the said Benajah W. Hiatt, his heirs and assigns forever.

Provided always, that if the said John H. Kenyon shall cause to be paid unto the said Benajah W. Hiatt his two promissory notes, one for four hundred dollars, dated Kansas Territory, 12 mo. 11th, 1858, payable and due on the Christmas day, in the year 1859; and the second for eight hundred dollars, dated Kansas Territory, 12mo. 11th, 1858, payable and due on Christmas day, 1860, bearing 6 per cent. from date, then these presents shall be null and void; otherwise to remain in full force and virtue in law.

In witness whereof the said John H. Kenyon has hereunto set his hands and seal this the thirteenth day of the fifth month, in the year eighteen hundred and fifty-nine.

JOHN H. KENYON. [SEAL.]
ASENETH W. KENYON. [SEAL.]

Signed and sealed and delivered in the presence of—
JOSIAH HIATT.

50 TERRITORY OF KANSAS,
County of Leavenworth:

Be it known that, on this the thirteenth day of the fifth month, A. D. 1859, personally came before me, a justice of the peace in and for said county & Territory, the signers and sealers of the foregoing mortgage, and acknowledged the same to be their own free act and deed; and Asenath W. Kenyon, wife of John H., upon examination by me separate and apart from her husband, acknowledged the same freely and of her own accord, for the purpose therein expressed, without fear or compulsion from any one.

WILLIAM PYLE, *J. P.*

OFFICE OF THE REGISTER OF DEEDS,
County of Leavenworth, Territory of Kansas, ss:

I, Scott J. Anthony, register of deeds within and for the county aforesaid, do hereby certify that the within and foregoing instrument of writing was received by me for record this second (2d) day of November, A. D. 1859, at 4¾ o'clock p. m., and that the same is duly recorded in book L, for recording conveyances, at pages 119 & 120.
51 In testimony whereof I have hereunto set my hand and official seal of office the day and year aforesaid.

[SEAL.] SCOTT ANTHONY,
Register of Deeds,
By D. C. STRAWBRIDGE,
Dep'ty.

STATE OF KANSAS,
Leavenworth County, ss:

I, John Wolkiewicz, register of deeds within and for the said county

of Leavenworth, and State aforesaid, do hereby certify that, on the margin of the record of the above and foregoing mortgage on record in this office, in book "L," at pages 119 & 120, is written an assignment thereof, of which the following is a true and correct copy, to wit:

"I hereby assign to Edward S. Brown the within mortgage, from John H. Kenyon and wife to me, as collateral security for the payment of a bond dated 29th May, A. D. 1860, payable twelve months after date, for two thousand four hundred dollars, signed by myself and Martha Ann, my wife, and made payable to Edward S. Brown.

Witness my hand and seal May 29th, A. D. 1860.

BENAJAH W. HIATT. [SEAL.]

Witness:

52 W. S. VAN DORN,
Register of Deeds.

In testimony whereof I have *I have*, at the office of register of deeds, in the city and county of Leavenworth, and State aforesaid, hereunto set my hand and official seal of office this 26th day of May, A. D. 1868.

[SEAL.] JOHN WOLKIEWICZ,
Register of Deeds, Leavenworth County.

(Endorsed:) John H. Kenyon. Mortgage to B. W. Hiatt. Fees, $1 25. Paid.

EXHIBIT "D."

LEAVENWORTH CO., K. T., 4*mo.* 11*th*, 1861.

ESTEEMED FRIEND BROWN: I have just arrived home from the East. Having an entire failure of crops on my farms in Kansas, I consequently went to the State of Pennsylvania, took a contract of some parties on the Allegheny River, by which I have been enabled to send some means home to my wife and children to subsist upon, also to feed my stock upon. I would have answered immediately, but was
53 not at home until now. My property was not sold for taxes. D. Smith, my neighbor, told me a few days before leaving that he paid my taxes on my ½ section alluded to in thy letter, and I should have paid it, but really had no money to pay it with, so it lays just so. But I now have the money to pay it, and will attend to it, and will have the deed recorded alluded to. Please write immediately, and say who I shall arrange the J. Kenyon mortgage with. I also have had the mortgage closed in Leavenworth, on the Perkins house and lot and bought it in, and how shall that be arranged? The poor people of Kansas have had a hard winter. The suffering has been very great. None have raised anything, excepting a few in Leavenworth and adjoining counties. The great difficulty is for us to get seed of all kinds, which none of us have. The price of land in Kansas is about the same as for the last twelve months. I could sell my half section for 20 dollars per acre; but would rather keep it than to take that. I now have a
54 good prospect of paying off thy mortgage on it when it comes due. I have some enemies here who have circulated the news that I have run off this winter, to never return. But I was only away to maintain my family; because I could neither collect anything owing to me or had anything to grow on my farm. I shall probably work on a contract in Pennsylvania this summer, and the proceeds I intend to pay thee on that mortgage. We have nice rains here now and fine prospects for crops.

Respectfully, thy friend,

B. W. HIATT.

EXHIBIT "E."

SUNNYSIDE P. O., CUMB. CO., VA.,
15th April, 1861.

B. W. HIATT, Esq.

DEAR SIR: I wrote to you some 2 months since in regard to the deed from Mr. Phelps, which Judge Huningray had deposited with the recorder, but which had not been recorded, on acc't of the fees not being paid. I also called your attention to the sale, for delinquent taxes,
55 on the half section where you reside. Since then I have heard nothing from you. Do me the favor to let me know whether these matters have been attended to. Let me know also how stands the judgment vs. G. W. Perkins. If the sale of the property is confirmed, and it be bought in, the deed of conveyance, if it can be so arranged, had better show on its face our understanding, that this is collateral security, together with the mortgage which you and Mrs. Hiatt gave on the bond of yourself and Mrs. Hiatt to me, which is to be released when the bond and interest is paid. Let me hear from you as soon as convenient.

Yours, very respectfully,

EDWARD S. BROWN.

(Endorsed:) Copy of letter to B. W. Hiatt, mailed 15th April, 1861.

EXHIBIT "F."

LEAVENWORTH CO., KANSAS,
Springdale P. Office, 5 mo., 4th, 1861.

FRIEND BROWN: Thine of the 15th of last month is before me.
56 I have not got the deed recorded alluded to. Have been to the office twice since my return home; but failing to see the recorder each time, is the reason of my not having it attended to. The sale of the Perkins property is not confirmed yet. I have been so much pressed for means, on account of the entire failure in crops in Kansas last year, that I really had to use what little money I had on hands to buy clothing and something to eat for my family, and could not, as yet, pay the costs of sale, &c. It is not, however, returned yet, and I will pay the costs if possible, which is about 70 dollars. The rents of the property is 225 dollars per annum. I have paid the taxes on my residence. John H. Kenyon is ready to renew his mortgage and note for 20 p'r cent., which I want done, as it will save me paying 10 per cent. out of my own pocket, which will be quite an item in these hard times. Send the papers to some att'y here and have them arranged, as that was our agreement. And then, friend Brown, his note has been due ever since Christmas and only drawing 10 per cent., and me paying thee 20.

Respectfully,

B. W. HIATT.

57 EXHIBIT "G."

SUNNYSIDE P. O., CUMB. CO., VA, 29 *May*, 1861.

B. W. HIATT, Esq.

DEAR SIR: Yours of the 4th inst. is at hand. Enclosed you will find such obligation for the payment of the additional interest to you, as I think Mr. Kenyon ought to give. He of course expects to pay you such

interest on the sum which he owes as, together with that due on his note, will make 20 p'r c't from the time his note became due. If you are satisfied with his responsibility there need not be any additional mortgage. If you are not, I will prepare a suitable mortgage and send it out to you.

I now write in haste with assurances of my respect and esteem.

I am yours, very truly,

EDWARD S. BROWN.

EXHIBIT "H."

Know all men by these presents that, whereas I am indebted
58 in the sum of eight hundred dollars, by note dated the 11th December, 1858, payable on the 25th December, 1860, to Benajah W. Hiatt, with interest at 6 p'r c't from date, with a credit of seventy-five , 7th February, 1860, endorsed thereon, which note is secured by mortgage executed by myself and wife, the 13th May, 1859, and recorded in the office of the register of deeds, county of Leavenworth, Kansas, book L, pages 119 & 120, which note and mortgage were assigned on the margin of the record, the 29th May, 1860, to Edward S. Brown, as collateral security for the payment of a bond of $2,400 secured by mortgage from said Hiatt & wife, recorded in the register's office, county of Leavenworth, Kansas, book L, page 476, which bond bears 20 p'r c't interest from maturity: Now, in consideration that further indulgence has been given to me in the payment of the note of $800, I do hereby bind myself to pay to Benajah W. Hiatt such additional interest on the principal sum due on said note as, together with the 6 p'r c't payable on its face, will make 20 p'r c't interest on said principal sum from the 25th December, 1860, until paid.

59 Witness my hand and seal this 29 day of May, 1861.

[SEAL.]

(Endorsed:) No. 107. Edward S. Brown vs. B. W. Hiatt & Martha Ann Hiatt. Amended bill. Filed April 1, 1869, A. S. Thomas, clerk.

And on this day, to wit, the 29th day of April, A. D. 1869, came the said defendants and filed in said clerk's office, their answer in the above-entitled cause, which said answer, together with the endorsements thereon, is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Kansas, ss:

The answer of Benajah W. Hiatt and Martha Ann Hiatt to the amended bill of complaint of Edward S. Brown, exhibited against them and now pending in the circuit court of the United States in and for the said district of Kansas.

60 The said Benajah W. Hiatt and Martha Ann Hiatt, now and at all times saving and reserving to themselves all and all manner of exceptions to the said complainant's bill of complaint as fully as if they now here excepted or demurred to the same, and saving the right to move the court for the dismissal of said bill as improperly and improvidently permitted to be filed, answering said bill, say they admit the execution of the note for twenty-four hundred dollars as alleged in

said bill, and the execution of the mortgage to secure the payment thereof as in said bill alleged.

Further answering, these defendants say that, at the time of the execution of said note and mortgage, the defendant Benajah W. was the owner of a note against John H. Kenyon for eight hundred dollars, dated November 11, 1858, and payable December 25th, 1860, with interest, the payment of which was secured by a mortgage executed by said Kenyon to said Benajah W., on the southeast quarter of
61 section number 30, in township No. 9, of range number 21, in the county of Leavenworth, in said State of Kansas, said land being ample security for the payment of said note. The Benajah W. was also at the same time the owner of a promissory note against one George W. Perkins for the sum of four hundred and seventy-five dollars, dated February 23, 1857, payable on demand, with interest until paid at the rate of twenty-five per cent. per annum, the payment of which was secured by a mortgage executed by said Perkins to said Benajah W., dated April 9th, 1858, for lot number 20, in block number 15, in the city of Leavenworth, proper, in said county, said lot being ample security for the payment of said debt, (both of which mortgage deeds were duly recorded in the office of the register of deeds of said county.) On the said Perkins note and mortgage, a suit was at that time pending in the district court of said county of Leavenworth, brought by said Benajah W. against said Perkins for the foreclosure of said mortgage and the sale of said premises. And the defendants say that said debts
62 were, at the time of giving said note for $2,400 and mortgage, transferred to the complainant as collateral security for the payment of said note—the said debt against said Kenyon by making an assignment on the margin of the record of said mortgage, and by endorsing said note and delivering it and said mortgage to the complainant; and the said Perkins note by writing an assignment of the claim in the docket in which the case was entered.

The defendants say it was part of the agreement between the parties that the suit then pending against said Purkins should continue to be prosecuted for the benefit of the complainant, and if not purchased by any other person when a sale should be had, it should be bid off for and in the name of the complainant. And it was also then further agreed that the complainant would, at any time, at the election of said Benajah W., give up to these defendants said note for $2,400, discharge the indebtedness thereof, and retain and hold as his own property, absolu-
63 tely in payment and satisfaction thereof, the notes aforesaid against said Kenyon & Purkins, and collect them for his own use and benefit. They say the complainant did thereupon receive said Kenyon note, the same being endorsed to him, and said Kenyon mortgage, and has ever since had the same, and neither of these defendants has since that time had said note and mortgage, or had any control over them; or if the same has been collected, or any part thereof, it has not been by the procurement of either of these parties, nor have they or either of them received any of the proceeds thereof. They say that if the complainant has not collected said note, he might by the exercise of reasonable and proper diligence have collected it a long time ago; that, at the time when it was endorsed to the complainant, said Kenyon was a man of pecuniary responsibility and able to pay his debts, including said note, and the land mortgaged for its payment as aforesaid was an abundant security for the payment of the note. They say if said note was not collected by the complainant, before the commencement
64 of this action, it was utterly worthless to them at that time, and

still is, and would have been, if they had had the note in their possession, for the reason that the right to bring an action thereon by them had long been barred by the statute of limitations of this State where said Kenyon resided when said note was executed and where he continued to reside until after the commencement of this action. But they say further that the complainant has never returned or offered to return said note to them, but has hitherto kept it himself. They say that thereby the complainant has made the said note his own, and in equity should be required to credit the same upon said note for $2,400, and they further say that whether the complainant has collected said note or not, he has been guilty of such neglect in collecting it, or in not attempting to collect it, that in equity and good conscience he should be charged with the full amount thereof, and the same should be credited on said note for $2,400.

65 These defendants say that the case against said Purkins was prosecuted until the property described in his mortgage was sold under the judgment or order rendered in the case and was struck off to the complainant, of which he, on or about the first day of February, 1861, was informed by the attorney having charge of the business. The sum for which it was bid off was $993 35. A deed for said property has been made to him by the master commissioner making the sale. These defendants say that after said property was in the manner aforesaid sold to the complainant, they did not, nor did either of them, claim or exercise any ownership or control over it, or receive any rents and profits thereof, but that the complainant did receive the rents and profits thereof.

These defendants say it was not agreed between the complainant and said Benajah W., that when the complainant should return to the State of Virginia the said Benajah W. would attend to said collaterals for the complainant. It was understood the suit against Purkins should go on until the property should be sold; beyond this, he had no control over it, and over the note against Kenyon, he had no control whatever,

66 and did not agree to exercise any.

These defendants say it was not agreed between them and the complainant, or between said Benajah W. and the complainant, that, after the lot described in said Purkins mortgage should be bid off in the name of the complainant, it was any longer to be regarded as a collateral for the payment of said note for $2,400; and they say that, after the same was bid off in the name of said complainant, they had not, nor either of them, any control over the same, nor any interest in it; they that, in the action brought by said Clinton Cockerill, mentioned in the complainant's bill, the complainant was made a defendant; they say the complainant did not answer the plaintiff's petition in that case, and that having, as they supposed, no legal interest in the matter in controversy, they did not answer it, and the judgment rendered in the case was rendered in default of answer.

These defendants say that if the title to said lot has failed the complainant, the loss should not fall upon them; they say they did

67 not, nor either of them, guarantee the title to the complainant.

The defendants further say that, some time in the year 1862, the said Benajah W., pursuant to the right reserved to him to make the election, wrote to and informed the complainant that he desired that the complainant should retain and receive said debts against said Kenyon and said Purkins, as his own property, in full satisfaction of said note for $2,400; and the complainant thereupon, in reply to this letter of said Benajah W., informing him of the election so made by said Ben-

ajah W., by a letter written to said Benajah W., and addressed to him, informed him that he did thenceforth hold the same as his own property, and that he held them in satisfaction and discharge of said note of $2,400; they say they have not now the said letter of the complainant, so that they can attach a copy thereof hereto; they say that, on the hearing of the case in the district court of the United States for the district of Kansas, referred to in the complainant's bill, the said Benajah had said letter in said court, and it was used in evidence on
68 the trial; they say that, after it had been so used in evidence, the said Benajah took it home with him, and they supposed at the time this action was commenced they had it, but though they have made diligent and thorough search therefor, they have not been able to find it.

These defendants, further answering, say that, in the year 1863, a certain suit or proceeding was pending in the district court of the United States for said district of Kansa', in which the complainant in this action and these defendants and others, were defendants, and was prosecuted by the United State', for the purpose, among other things, of confiscating the aforesaid alleged debt from these defendants to the complainant, for the reason, as alleged in the complaint, information, or libel filed in said proceeding, that the complainant had acted as an officer in the army of the rebels in arms against the Government of the United States, and had otherwise participated with the rebels in the late rebellion against the Government of the United States; in which suit or proceeding these defendants filed their answer, in substance and
69 effect containing the same allegations as are herein made, and particularly alleging that said note for $2,400 had been paid and satisfied, as herein alleged; and thereupon said suit was by said court dismissed as to these defendants; and in the same suit or proceeding, the said debt against said Kenyon was confiscated by the judgment of said court to the United States, as the property of the complainant; and, as they have been informed and believe, and charge the truth to be, said debt has, since the same was confiscated, been paid by said Kenyon to the purchaser thereof, under the proceedings aforesaid.

These defendants deny that the confiscation of said Kenyon note was procured by and through the false and fraudulent representations, or through the misconduct of said Benajah W. Hiatt, or that in the matter of said confiscation proceedings he was guilty of any false or fraudulent representations, or of any misconduct, as charged by the complainant in his said bill.

And these defendants, further answering, say that the complainant should not prosecute or maintain this action against them on said
70 note for $2,400, because they say this action was not commenced within the period of three years after the complainants' cause of action accrued; and they further say the complainant should not and cannot prosecute or maintain this action, because they say the complainant's bill of complaint was not filed in this case, nor was any bill of complaint filed in this action during the period of three years after the said cause of action accrued to the complainant, and before the filing of such bill.

These defendants, further answering, deny that, during the period of the war referred to by the complainant in his bill of complaint, he was prevented from bringing an action on his said note; they deny that the time during which the war existed is, by operation of law, excluded from the computation in which the statute of limitation bars the complainant's right of action; but they say that, excluding all of such

time, their action was not instituted, and the complainant's bill of complaint, or any bill of complaint filed in this action within three years from the time when his right of action accrued, and the action is there-
71 fore barred by said statute of limitations.

These defendants say the complainant has never redelivered to the said Benajah W. Hiatt the said Kenyon note and mortgage, nor offered to redeliver the same to him, nor has he ever reassigned to him the said debts against said Kenyon & Purkins, or offered so to do; and they say that the complainant, by retaining said debts, and the evidence thereof, in his hands so long, whether he has or has not collected them, has made them his own, and should be required to apply them on said writing obligatory for *for* $2,400; and they say said debts against said Kenyon and Perkins exceeded the amount of said note from the defendants to the complainant.

These defendants admit the bringing of a suit by said Clinton Cockerill, as stated in the complainant's bill of complaint. The action was brought to foreclose a mortgage held by said Cockerill upon the lot covered by said Purkins mortgage, executed by said Purkins to said Cock'rill, in which action these defendants and said complainant
72 were defendants, and in which it was claimed by said Cockerill that, by reason of a defective acknowledgment of the said mortgage from said Purkins to said Benajah W. Hiatt, his mortgage, though subsequent in date, gave him a lien on said lot superior to the lien of the said mortgage to said Hiatt. And they admit that in that action the said Clinton Cockerill, for the reason above stated, obtained a decree for the sale of said lot, under which the same was sold for the benefit of said Cockerill; but they say that said action was commenced and said decree rendered after said lot had been sold to the complainant, as above alleged *to the complainant*, after he had knoweledge that it had been sold to him, and had treated it as his own property, after the said Benajah W. Hiatt had notified him of his election, that the complainant should take said Kenyon and Purkins debts in payment of said $2,400 note, and after the complainant had agreed so to do, as above stated.

And now having fully answered said bill, they pray to be hence
73 dismissed, with their costs in this behalf expended.

B. W. HIATT.
MARTHA ANN HIATT.

H. GRISWOLD,
Solicitor for Def't.

UNITED STATES OF AMERICA,
District of Kansas, ss:

The within-named defendants, Benajah W. Hiatt and Martha Ann Hiatt, on their solemn affirmations, do say that the allegations contained in the foregoing answer, so far as the same are stated as of their own knowledge, are true, and that the matters therein stated on information and belief are true, according to the best of their knowledge, information, and belief.

B. W. HIATT.
MARTHA ANN HIATT.

Affirmed to and subscribed before me the 19th day of May, 1869.

S. B. WILLIAMS,
U. S. Commissioner.

(Endorsed:) 107. Edward S. Brown vs. B. W. Hiatt & Martha Ann Hiatt. Answer. Filed April 29th, 1869. A. S. Thomas, clerk.

74 And on this day, to wit, the 30th day of April, A. D. 1869, came the said plaintiff, by his solicitors, and filed in the said clerk's office his replication to the matters in defense, which said replication, together with the endorsements thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN, COMPLAINANT,
vs.
BENAJAH W. HIATT AND MARTHA ANN HIATT,
defendants.

The replication of Edward S. Brown, complainant, to the answer of Benajah W. Hiatt and Martha Ann Hiatt, defendants.

This repliant, saving and reserving to himself all and all man-
75 ner of advantage of exceptions to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill, he hath already prayed.

EDWARD S. BROWN,
By GREEN & FOSTER,
His Solicitors.

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Replication of Edward S. Brown, plaintiff, to the answer of Benajah W. Hiatt & Martha Ann Hiatt, defendants. Filed April 30, 1869. A. S. Thomas, clerk.

76 And on this day, to wit, the 19th day of May, A. D. 1869, came the said plaintiff, by his solicitor, and filed in the said clerk's office his deposition in the above-entitled cause, which deposition, together with the endorsements thereon, is in the words and figures following, to wit:

The deposition of Edward S. Brown, taken the 10th day of May, 1869, on oath, before R. S. Lacy, United States commissioner for the circuit court of the United States for the district of Virginia, at the office of Edward S. Brown, in the city of Lynchburg, in the State of Virginia, in pursuance of the commission and notice hereto attached, to be read as evidence for the plaintiff in a suit in equity, pending in the circuit court of the United States for the district of Kansas, in which Edward S. Brown is plaintiff, and Benajah W. Hiatt and Martha Ann Hiatt, his wife, are defendants.

The deponent, being first duly sworn, deposeth as follows:

1. Question. What is your age, residence, and citizenship?

77 Ans. I am fifty-one years old; I reside now in the city of

Lynchburg, in the State of Virginia; for 18 years preceding Nov., 1863, I resided in Cumberland County, State of Virginia; from Nov., 1863, to Sept., 1866, I resided in Powhattan County, an adjoining county to Cumberland, in said State; from Sept., 1866, I have resided in Lynchburg; I am, and have been during my life, a citizen of Virginia.

2. Question. Are you the plaintiff in said cause?

Ans. I am.

3. What was the agreement, if any, between B. W. Hiatt, one of the defendants in this cause, and yourself in regard to the payment of the bond which he and Martha Ann Hiatt executed to you for $2,400 00?

Ans. The bond was for a loan at 20 p'r c't interest per annum. The amount was larger than I was willing to lend on the land which Mr. Hiatt proposed to mortgage to secure its payment, and he proposed, as additional security to that of the mortgage, to place in my hands two collaterals: One, a note executed to him by John H. Kenyon for
78 eight hundred dollars, bearing six per cent. interest from the 11th Dec., 1858, payable 25th Dec., 1860, with a credit of $75 00 as of the 7 Feb., 1860, endorsed thereon, with a mortgage from said Kenyon to secure the payment of said note; the other a judgment which B. W. Hiatt had received against George W. Perkins for $763 00 and cost $13 82, which judgment carried, I think, 7 per cent. interest, but I do not remember the rate of interest; I have no note of the rate of interest or the time from which it was to be computed. Of the other dates and am'ts, I have notes made at the time, from which my memory is refreshed. This I accepted. The loan was made. The mortgage was executed by B. W. Hiatt and Martha Ann Hiatt. The assignment of the Kenyon note and Kenyon mortgage was written on the margin of the records where the Kenyon mortgage was recorded, and an assignment of the judgment against Perkins was written on the margin of the record where the judgment was entered. It was agreed that B. W. Hiatt and Martha Ann Hiatt would execute their bond, payable one
79 year thereafter, with one year's interest included, and that B. W. Hiatt would place in my possession Kenyon's note and Kenyon's mortgage, to be retained until said bond was discharged, or until it might become necessary resort to them for the payment of said bond; and further, as I resided in Virginia, and would soon return to my home, and Mr. Hiatt resided in Leavenworth County, Kansas, that he would exercise over these collaterals such oversight as might become necessary to preserve them for the purposes to which they had been appropriated. These were the agreements, and all the agreements. In execution of them, I gave Mr. Hiatt my sight draft on Clark, Gruber & Co. for two thousand dollars. He delivered to me the bond of himself and Martha Ann Hiatt for the payment of $2,400 00 twelve months thereafter, and the mortgage of himself and Martha Ann Hiatt to secure the payment of said bond, and, as collateral thereto, he made the assignments on the records as stated, and placed in my hands
80 Kenyon's note and Kenyon's mortgage. These were simultaneous actions. They were done on the 29 May, 1860. I have not seen either of the defendants since. I left Kansas on my return home 2 or 3 days after that time.

4. Question. Was there any endorsement on Kenyon's note showing its assignment to you?

Ans. There was no endorsement on the note showing its assignment.

5. Question. Was there any endorsement of any kind on said note?

Ans. There was an endorsement previously made of a credit of $75 00 the 7 Feb. 1860.

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 95.

BENAJAH W. HIATT ET AL., APPELLANTS,

vs.

EDWARD S. BROWN.

CERTIORARI AND RETURN.

FILED DECEMBER 3, 1872.